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IN THE

# Supreme Court of the United States

**October Term, 1960**

**No. 91**

UNITED STATES OF AMERICA,
*Appellant,*

v.

ROY FRUEHAUF, ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## PETITION FOR REHEARING

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*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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## PETITION FOR REHEARING

The appellees Roy Freuhauf, Fruehauf Trailer Company, Burge Seymour, Associated Transport, Inc., and Brown Equipment and Manufacturing Co., pray for a rehearing of the decision herein rendered February 20, 1961, upon the following grounds:

1. *This Court was wholly without jurisdiction upon this appeal to determine that a judicial admission contained in the Government's trial memorandum was "impermissible" as a basis for dismissing the indictment.* In the absence of express statutory authority, no appeal may be taken by the United States in any criminal case, and this Court is without jurisdiction to entertain such appeals. *United States* v. *Sanges*, 144 U. S. 310 (1892); *United States* v. *Dickenson*, 213 U. S. 92 (1909); *United States* v. *Burroughs*, 289 U. S. 159 (1933). For this reason, and because "appeals by the Government in criminal cases are something unusual, exceptional, not favored", this Court has consistently resisted "the opening of an appellate route for the Govern-

ment until it was plainly provided by the Congress", and, then, it has with equal consistency enforced "a close restriction of its uses to those authorized by the statute." *Carroll* v. *United States*, 354 U. S. 394, 400 (1957).

Here, the dismissal of the indictment was appealable, and this Court had jurisdiction over the appeal solely by virtue of the Criminal Appeals Act, Tit. 28 U. S. C. § 3731, which authorizes an appeal in such cases to assure uniformity in the construction of statutes. *United States* v. *Mersky*, 361 U. S. 431, 434-436 (1960). To that end, the Act vests this Court with a narrow jurisdiction only, "confined to ascertaining whether the court in a case under review erroneously construed the statute." *United States* v. *Carter*, 231 U. S. 492, 493 (1913); *United States* v. *Keitel*, 211 U. S. 370, 397, 398 (1908). Upon an appeal such as this, "this Court is not at liberty to go beyond the question of the correctness of, * * * [the District Court's] construction" of the statute, for "The Government's appeal does not open the whole case." *United States* v. *Borden Co.*, 308 U. S. 188, 193 (1939); *United States* v. *Petrillo*, 332 U. S. 1, 5 (1947); *United States* v. *Patten*, 226 U. S. 525, 535, 540 (1913).

On this appeal, however, the Court expressly declined to exercise its only jurisdiction under the Criminal Appeals Act—to review the contested construction of the statute—assigning as a reason that the question posed was so "unclear", and had become so "abstracted", as to make the appeal nothing "other than a request for an advisory opinion", which the Court has "consistently refused to give." The Court, nevertheless, set aside the ruling of the District Court dismissing the indictment, and remanded the case for trial, because

> "the District Court's ruling, insofar as it purports to close any avenues open to the Government under the indictment—not in view of specifications made in a bill of particulars or an opening statement, but on the basis of a 'judicial admission' culled from a

pretrial memorandum—was impermissible and constitutes an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal."

But, as *Keitel*, *Carter*, *Borden*, *Petrillo* and *Patten* make plain, the alpha and omega of this Court's jurisdiction under the Criminal Appeals Act was the single question whether the District Court correctly construed the statute on which the indictment was founded. Thus, whether representations made by the Government in its trial memoranda have the same quality to bind as those made in its bills of particulars and opening statements, and what constitutes a "judicial admission" on which a dismissal of an indictment may be based, were questions dehors the narrow limits of this Court's closely defined jurisdiction under the Criminal Appeals Act. These are questions which the Congress has not confided to this Court to determine upon a direct appeal by the Government in a criminal case, and this Court should not have undertaken to decide them. Certainly, this Court should not have set aside the ruling of the District Court and remanded the case for trial on these grounds, wholly beyond its jurisdiction.

2. *This Court was wholly without jurisdiction upon this appeal to construe the statement of facts contained in the Government's trial memorandum.* This Court undertook to construe the statement of facts in the Government's trial memorandum, saying "what the portions of the trial memorandum" relied on by the District Court appeared to it to "establish, at most." It rested its decision on the ground that such statement, as construed by it, "seemingly" permitted the Government "to make out violations of § 302 on any number of alternative theories," five of which it particularized, and that it was "uncertain" to which of these the District Court's ruling was directed. But, where the District Court has dismissed an indictment on the ground that the acts therein charged to the defendant are not crimes under its construction of the statute on

which the indictment was founded, this Court has consistently held that is was withou jurisdiction under the Criminal Appeals Act to "construe" the indictment, and that it "must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review." *United States* v. *Borden Co., supra,* 308 U. S. at 193; *United States* v. *Patten, supra,* 226 U. S. at 535, 540; *United States* v. *Carter, supra,* 231 U. S. at 493; *United States* v. *Keitel, supra,* 211 U. S. at 397, 398; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301, 302, 306 (1919); *United States* v. *Miller,* 223 U. S. 599, 602 (1912).

This follows, as *Keitel* makes clear, from the restricted jurisdiction of this Court under the Criminal Appeals Act, "only to review the particular question decided by the court below for which the statute provides * * * leaving all other questions to be controlled by the general mode of procedure governing the same." 211 U. S. at 397, 398. For the same reason, this Court's jurisdiction under the Criminal Appeals Act does not extend to construing bills of particulars, opening statements or trial memoranda relied upon by the District Court in dismissing an indictment. The full extent of this Court's jurisdiction on this appeal was "to ascertain, as accurately as may be, what interpretation the trial court placed upon" the trial memorandum, "not to interpret it * * *; and then to determine whether, so construed," the acts which the Government thereby represented it would show at the trial, constituted violations of the statute as construed by this Court. *United States* v. *Colgate, supra,* 250 U. S. at 306.

This Court was without jurisdiction on this appeal to construe the trial memorandum, and it should not have undertaken to do so. Nor should this Court have set aside the ruling of the District Court and remanded the case for trial, on the ground that it was "uncertain" which of "any number" of the alternative constructions of the trial memorandum which this Court perceived extrajurisdictionally, was the District Court's construction.

3. *Having declined to exercise its jurisdiction to review, this Court's alternatives were to dismiss the appeal, or to remand the case to the District Court for further proceedings with a view to eliminating the impediment to this Court's exercise of its jurisdiction.* The Court's decision presents a paradox: Although expressly declining to exercise its jurisdiction under the Criminal Appeals Act, alone invoked by this appeal, to review the construction of the statute underlying the ruling of the District Court, this Court has nevertheless set aside such ruling, and has remanded the case for trial. It creates an anomaly, too, in that a ruling of the District Court, which neither this Court nor any other appellate court has held to be erroneous on a ground within its jurisdiction to consider, has been set aside, and the case remanded for trial, just as though the ruling had not been made, or had been found to be error upon review. This consequence flows, it would appear, because this Court found the action below "an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal."

But, in this circumstance, the appropriate disposition of the appeal is either to dismiss it, as the cases cited by the Court itself clearly show, *Parker* v. *Los Angeles County*, 338 U. S. 327 (1949); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); *Alabama State Fed. of Labor* v. *McAdory*, 325 U. S. 450 (1945); see also, *United States* v. *Carter*, 231 U. S. 492 (1913), or, if further proceedings below can eliminate the impediment to the exercise of this Court's jurisdiction, to remand the case for such further proceedings. *United States* v. *Malphurs*, 316 U. S. 1 (1942); *Barr* v. *Matteo*, 355 U. S. 171 (1957); *Jennings* v. *Illinois*, 342 U. S. 104 (1951); *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); Cf. *Dixon* v. *Duffy*, 342 U. S. 33 (1951); *Loftus* v. *Illinois*, 334 U. S. 804 (1948). Certainly, the frustration of the Government's appeal to this Court, and the lack of appellate jurisdiction in any other court, should not serve to deprive the appellees of the benefit of the District Court's

ruling, and if further proceedings below pursuant to this Court's direction cannot result in the review contemplated by the Criminal Appeals Act, the case should be left "as though" the Government "had taken no appeal." *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677, 678 (1944); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631 (1949). For, this Court has consistently taken meticulous care to preserve or restore the *status quo ante*, when in other circumstances its appellate jurisdiction has been unsuccessfully invoked. See, e.g., *United States* v. *Belt*, 319 U. S. 521 (1943); *Phillips* v. *United States*, 312 U. S. 246 (1941); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 (1934); *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1934).

This Court should not have set aside the ruling of the District Court and remanded the case for trial, and thus upset the *status quo*, while at the same time declining to exercise its only authority under the Criminal Appeals Act —to review the construction of the statute on which the District Court's ruling was based.

4. *Having declined to exercise its jurisdiction to review, this Court derived no power from Tit. 28 U. S. C. § 2106 to set aside the ruling of the District Court and to remand the case for trial.* Tit. 28 U. S. C. § 2106 is not a grant of independent jurisdiction, but of powers incidental to this Court's appellate jurisdiction derived *aliunde*. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 241, fn. 17 (1957). Accordingly, this Court may exercise such powers in any given case only in consonance with its jurisdiction, and it may not invoke them on grounds, or for purposes alien to its jurisdiction. *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547 (1932). Here the jurisdiction of the Court was confined to determining the correctness or otherwise of the District Court's construction of the statute on which the indictment was based, but the Court expressly declined to consider that question. Yet, citing

§ 2106, it set aside the District Court's ruling and ordered that the case proceed to trial just as though the District Court had not dismissed the indictment, or this Court had determined that the District Court's construction of the statute was erroneous.

§ 2106 cannot be read as authorizing any such procedure, unless this Court is prepared to say that on appeals under the Criminal Appeals Act, and similar statutes vesting this Court with a limited jurisdiction to consider particular questions only, § 2106 grants this Court full powers to review questions not within its competence to consider under such statutes. So to hold, however, must necessarily involve the discard of the limitations on this Court's jurisdiction carefully defined in *Carter, Keitel, Borden, Miller, Petrillo, Colgate* and *Patten*, and the adoption of a new principle, contrary to the old, that the Government's appeal *does* open the whole case for review. If the Court meant to effect so radical a change, it would seem unlikely that it would have done so elliptically, and without discussion.

Having declined to pass upon the single question open to it to consider under the Criminal Appeals Act, Tit. 28 U. S. C. § 2106 did not authorize this Court to set aside the ruling below and to remand the case for trial.

5. *None of the questions considered by the Court had been raised, briefed or argued by the parties.* In its opinion, the Court said, in its discussion of advisory opinions, that it has "consistently refused" to speak

> "upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *."

Yet upon this appeal, this Court undertook to determine (1) that a judicial admission in the Government's trial memorandum was an "impermissible" basis for the dismissal of an indictment, (2) that the statement of facts in the Government's trial memorandum was susceptible of "any number" of constructions, including the five it described with particularity, (3) that the ruling of the District Court was appropriately to be set aside and the case remanded for trial notwithstanding this Court's refusal to exercise its statutory jurisdiction to review, and (4) that Tit. 28 U. S. C. § 2106 empowered the Court to set aside the ruling below and to remand the case for trial in the absence of a determination that the District Court's construction of the statute was erroneous—although none of these matters had been raised, briefed, argued, or as much as mentioned by the parties. For, as this Court correctly noted, the sole question presented by the Government's jurisdictional statement was "whether a loan of money comes within the * * * prohibitions" of § 302 of the Labor Management Relations Act, 1947 and

> "Briefs and oral argument in this Court proceeded upon the assumption that this question, and only this question, was properly raised * * *."

Moreover, if, as this Court said, Rule 15 did not require it "to penalize the Government by dismissing this appeal *simpliciter*," it can with equal force and fairness be said that the frustration of the Government's appeal neither required nor permitted this Court to penalize the appellees by setting aside the action of the District Court *simpliciter*, and remanding the case for trial.

6. *It is urged that the Court should, in any event, make it clear that in formulating the five "alternative theories" under which "the Government may have attempted to make out violations of Section 302," the Court did not express any opinion as to their applicability.*

In the course of its illustrative demonstration, the Court explicitly and painstakingly formulated five "alternative theories" under which the Government might have proceeded, and therefore may proceed. It qualified this by referring only to "questions of variance between indictment and proof," but not to any questions of substantive proof or statutory construction.

We are certain that this Court did not intend to indicate its opinion as to the validity of any of these alternative theories. However, we cannot be as certain that a District Judge, stimulated perhaps by the Government, will not, albeit unwarrantedly, entertain some doubt as to the Court's intention. The danger, in a subsequent trial or other proceeding, of any intimation of its views by any appellate court which refuses jurisdiction, was cogently pointed out in *Zalkind* v. *Scheinman*, 139 F. 2d 895, 904 (2d Cir., 1943), cert. den. 322 U. S. 738.

In view of the unique authority of this Court, the possibility that its language will influence the District Judge to whom the case is remanded or indicate, however obliquely, that this Court believes that the facts enumerated fall within the proscription of the statute, is so prejudicial to the appellees as in all fairness to require the Court's disclaimer of any such opinion. The unfairness of any such interpretation of the Court's language is all the greater because the appellees were never notified that any of these issues (except the fifth alternative) would even be considered and, in reliance upon the Government's repeated limitation of the question involved, they did not brief or argue them.

It is therefore strongly urged that this Court, in order to avoid any such possibility of unintended prejudice, clarify—if it does not recall—its opinion, by explaining that it is not expressing any view as to the application of the statute to, or the liability of the appellees under, any of the facts or hypotheses enumerated.

## Conclusion

For all of the reasons hereinabove set forth, the opinion herein should be recalled, and this petition for rehearing should be granted. The appeal should be dismissed or, if further proceedings below can eliminate the impediment to this Court's jurisdiction, the case should be remanded for such further proceedings. In any event, it is urged that the opinion should be clarified to explain that the Court has not expressed any view as to the application of the statute under any of the hypotheses described by it.

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The undersigned counsel for the appellees making this petition hereby certify that it is presented in good faith and not for delay.

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# SUPREME COURT OF THE UNITED STATES

No. 91.—October Term, 1960.

United States, Appellant, v. Roy Fruehauf, et al. | On Appeal From the United States District Court for the Southern District of New York.

[February 20, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

On June 17, 1959, an indictment in two counts was filed in the United States District Court for the Southern District of New York against appellees Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., and Brown Equipment and Manufacturing Co. (hereinafter referred to collectively as the Fruehauf-Seymour group) [1] and appellee Dave Beck. The first count, based on § 302 (a) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U. S. C. § 186 (a), which makes it unlawful "for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce," [2]

[1] It appears that Roy Fruehauf is President of Fruehauf Trailer Co., that Burge Seymour is President of Associated Transport, Inc., and that Brown Equipment and Manufacturing Co. is a wholly owned subsidiary of Associated Transport, Inc.

[2] Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, enacted September 14, 1959, amended this section to read, in pertinent part:

"It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce. . . ."

charged that on or about June 21, 1954, each of the appellees of the Fruehauf-Seymour group, employers of employees engaged in an industry affecting commerce,

> "did unlawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to Dave Beck, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

The second count, based on § 302 (b), 61 Stat. 157, 29 U. S. C. § 186 (b), and similarly couched in the words of the statute,[3] charged that Beck had received and accepted, and agreed to receive and accept, from the appellees of the Fruehauf-Seymour group, $200,000. All of the appellees entered pleas of not guilty; after various pretrial proceedings, during the course of which "trial memoranda" were submitted by the Government and by several of the appellees, the case came on for trial. At the outset of the hearing, the district judge suggested that if, as he was advised by the trial memoranda of certain among the appellees, any of them intended to move for dismissal of the indictment, such a motion should be made at that time. Counsel for the appellees replied that they "would

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[3] Count Two of the indictment charged that "On or about the 21st day of June, 1954, . . . Dave Beck, . . . a representative of employees who were engaged in an industry affecting commerce . . . did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from [the several appellees of the Fruehauf-Seymour group], employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000." Section 302 (b), as it was in effect at the time of the transaction alleged, provided: "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." The Labor-Management Reporting and Disclosure Act of 1959, § 505, amended the section to cause it to parallel the amended version of § 302 (a), note 2, *supra*.

be in a better position to address ourselves to the grounds for a dismissal after the government had made an opening here. . . . if on inquiry in this pretrial, preliminary conference, the government conceded certain positions that it has conceded at arraignment and other places in the minutes." The district judge then read into the record an extended excerpt from the Government's trial memorandum[4] which purported to outline the "facts which support the charge and which the government intends to prove." These were: (A) that Beck asked Roy Fruehauf to "lend him $200,000," which "loan" was subsequently discussed at a meeting of Fruehauf and attorneys for Beck and Fruehauf Trailer Co.; that after unsuccessful attempts to "place the loan" with officers of various banks, "Fruehauf and Burge Seymour found it necessary to arrange the loan without the aid of financial institutions and, instead, processed it through the Fruehauf Trailer Co. (Roy Fruehauf, president), Associated Transport Co. (Burge Seymour, president), and the latter's wholly owned subsidiary Brown Equipment and Manufacturing Co." (B) that "The method by which this otherwise simple transfer of $200,000.00 from Fruehauf to Beck was effected is a fairly complex one, apparently caused by difficulties encountered by the defendant employers in effectuating what they have called a 'loan' but without officers of their corporations learning of the transaction." (C) that "[T]he details of this circuitous financing operations [*sic*]" were as follows: Inasmuch as "Neither Fruehauf nor Seymour wished to effect the loan

[4] The memorandum has not been made a part of the record in this Court. As read into the record, in part, by the district judge, it appears to have been prefixed by the statement:

"This memorandum is submitted for the purpose of supplying the Court with a general outline and analysis of the facts the government intends to prove together with an exposition of the statutory and decisional [*sic*] law regarding the crime charged in the instant case."

by use of personal funds," and "neither Fruehauf nor Seymour felt that their respective corporations could overtly finance the transfer of funds in such an amount without embarrassing themselves," it was determined that the Brown Company "would actually make the transfer to Beck." Thereupon, (1) on June 21, 1954, Fruehauf Trailer Co. "transferred" $175,000 by check to Brown in exchange for Brown's $175,000 promissory note, payable December 30, 1954, and "purporting to bear interest in the amount of 5% per annum," whereas, in fact, "no interest was ever paid to, or even anticipated by, Fruehauf or his corporation." (2) Brown, on the same date, transferred $200,000 to Beck in return for Beck's promissory note for that amount at 4% per annum, payable December 30, 1954—a Brown check requisition form which falsely listed the object of this transfer, being explained by Seymour as intended to conceal from "the people in Associated . . . that Beck was borrowing Associated funds." (3) Associated, on the same date, transferred $200,000 to Brown. One week later, Brown returned to Associated $175,000, the amount lent Brown by Fruehauf. On December 30, 1954, "after Seymour had renegotiated the loan with Manufacturers Trust Co.," Brown returned the remaining $25,000 to Associated. ("It should be noted that Beck was supposed to, but did not, repay the 'loan' to Brown by December 30, 1954.") (4) On December 27, 1954, Seymour borrowed $200,000 at 4% per annum for 90 days from Manufacturers Trust Co., collaterizing the loan with Beck's note and obligations of Fruehauf, Seymour and others, including an attorney for Fruehauf Trailer Co. (5) Seymour paid $2,066.66 interest to Manufacturers Trust, and by check dated March 30, 1955, returned the $200,000 loan to the bank. (6) "Beck paid the $200,000 loan from Brown by remitting to Seymour $163,215, on or about April 11, 1955, and $36,785, on or about June 30, 1955, which Seymour endorsed to

Brown." (7) "Only $4,000 interest, approximately half of the interest due, was actually paid and that was remitted in the form of a check . . . [from Fruehauf Trailer Co.'s attorney] to Seymour."

Having read this portion of the Government's memorandum for the purpose of making known to the appellees "the government's position, at least on the matter of the loan," the district judge ruled that "in my view that statement by the government is a judicial admission that the transaction was a loan. As a matter of fact, to verify that belief, the government later argues in its brief that the use of the money was a thing of value. So at least, so far as I am concerned, there can be no dispute that the government's position is that this was a loan, and we are now resolved to the question of whether a loan under these circumstances was illegal under the statute. . . ."

"[O]n the basis of the disclosure by the Court of what the Court understands to be a judicial admission by the government," the court then asked again whether appellees wished to be heard on a motion to dismiss. At this point, government counsel interposed "to communicate one thought to the Court that may not have been communicated by my brief." He stated:

> "Despite the fact that there is the repeated use of the word 'loan' in the government's advance outline before the Court, caused by the fact that the government's case in large part is as asserted by these defendants as the trial will reflect as it proceeds, nevertheless the government's position on the loan, and I hope to make this clear as the trial progresses, is actually twofold.
>
> "A loan, if your Honor please, is something that relates to a state of mind between the person who is receiving the money and the person who is giving the money, and again the repayment which actually occurred in this case is only one aspect of whether or

not the transfer of funds between one party or from one party to another is actually a loan.

"Now, to be quite specific, I will simply say that the position that the government takes is that the government has called this a loan, and in reiterating the facts as we know them from the defendants, the defendants having repeatedly used the word 'loan,' we say that this is not necessarily so, because in fact any loan when it is made, to prove the fact that it was a loan, goes through certain stages, and is accompanied by certain attributes and here those items were not present in this case."

After adverting to the size of the "loan," the fact that no collateral was given, and the facts that the "loan" could not be processed through financial institutions, that no interest was paid between the corporations although the transaction purported to require its payment, and that Beck did not in fact pay the 4% interest due under the terms of his note to Brown, government counsel concluded: "That is our first position. And the second position is that even if this is a loan as a matter of law it is still encompassed within the statute." The district judge replied:

"I do not think that anything you said detracts from the argument that you made in your memorandum, that you are going to prove that this was a loan, and on that basis I intend to entertain an application with respect to the dismissal of the indictment."

All of the appellees moved to dismiss on the ground, among others, that the transaction between Beck and the Fruehauf-Seymour group, being a "loan," was not within the prohibition of the statute. Argument on the motion was had, and government counsel reiterated his position:

"The COURT: Assuming that this case was tried and the Court was disposed to frame special interroga-

tories to the jury, and one of those interrogatories was, Was the transaction a loan, and the jury brought back the answer No: do you think the Court could allow that answer to stand on the basis of the facts as you have set them forth in your brief, or wouldn't the Court have to set aside the finding as being contrary to the evidence and the weight of the evidence?

"Mr. GUZZETTA: Your Honor, in the context of the remarks I made after you read in open court my brief, I would say that that would not be an erroneous finding by them.

"The COURT: In other words, your position is that despite the facts which you set forth this could be held to be not a loan? When I say the facts you set forth, I mean the facts in your memorandum.

"Mr. GUZZETTA: As I tried to indicate, . . . the government's position is twofold. If it wasn't a loan, if the jury determine on the basis of the facts which they hear that this was—that the outer clothing, fabricated by one highly complex intercorporate transaction, didn't make this transfer a loan, clearly, it would come within the statute. There would be no problem in my mind at all. Secondly, if the jury decided that it was a loan, I wouldn't say that that would preclude them from finding a verdict of guilty because, . . . a loan is encompassed under the statute."

The District Court granted the motions to dismiss the indictment as to all of the appellees. It ruled:

"I am convinced that the language which I read into the record from the Government's brief is a judicial admission that this transaction was a loan. I have no doubt in my own mind at least, that in a trial either to the court or the jury, in a preliminary hearing where the defendants have not yet subjected themselves to jeopardy, if the Government estab-

lished the facts which it recounted in its brief that it intended to prove, a finding by a jury to the contrary would have to be set aside, nor could the Court find to the contrary. Those facts, in my view, notwithstanding the qualifications attempted orally, and despite those qualifications and accepting those qualifications, those facts, in my view, establish that the transaction was a pure and simple loan.

". . . Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not."

From this oral ruling the Government brought the case here by direct appeal pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731. The sole question presented in its Jurisdictional Statement is "whether a loan of money comes within the . . . prohibitions" of § 302 of the Labor Management Relations Act, 1947.[5] Briefs and oral argument in this Court proceeded upon the assumption that this question, and only this question, was properly raised by the record, and that the question, thus shaped, presupposed the substantial reality and *bona fides* of the "loan." Counsel for the Government, in response to questions from the bench, asserted that in light of the framing of the issues on this direct appeal, the Government's trial theory would have to be that the Beck-Fruehauf-Seymour transaction was an incontestable, good-

[5] This statement of the question differs from that in the Government's Notice of Appeal, which stated the issue to be "Whether the payment of money by an employer (of employees in an industry affecting commerce) to a representative of his employees, intending repayment of said money with interest, is within the proscriptions of Section 302 (a) and (b) of the Labor Management Relations Act, 1947. . . ."

faith loan at a fair rate of interest, and that such other circumstances of the transaction as the lack of collateral would be immaterial. However, in a subsequent communication addressed to the Court and opposing counsel by the Solicitor General, the Government took the position "that the Court may properly take account in disposing of this case of the salient facts with respect to the transaction, as developed by the prosecutor before the district judge and as taken into account by the district judge in dismissing the indictment, and that the question before the Court may be considered in the factual context in which it was presented; the question presented fairly comprised the two issues of (1) whether any loan was covered by Section 302, and (2) whether this loan was covered by Section 302."

On this record, the question put to the Court for our direct review under 18 U. S. C. § 3731 is left unclear. An indictment cast in statutory language has been dismissed for failure to charge an offense within the meaning of the legislation whose words it employs, on the ground (as expressed in the ruling of the District Court) that the Government's trial memorandum constituted a "judicial admission that the transaction was a loan." The portions of the trial memorandum upon which this ruling rests establish, at most, that approximately a year after the Fruehauf-Seymour group transferred $200,000 to Beck, Beck transferred $200,000 back to the Fruehauf-Seymour group, with $4,000 "interest," "approximately half of the interest due." On the basis of such facts, putting aside of course all questions of variance between indictment and proof that might emerge at a trial, seemingly the Government might have attempted to make out violations of § 302 on any of a number of alternative theories: (1) that the "loan" was a sham, a mere ruse and covering device intended to pass from Fruehauf and Seymour to Beck a gift or bribe of money; (2) that irre-

spective of intention, the acceptance by the Fruehauf-Seymour group of $200,000 plus $4,000 interest in satisfaction of Beck's obligation to repay the "loan" with twice that amount of interest constituted a forbidden delivery of the unpaid interest to Beck; (3) that irrespective of the terms of Beck's note, the loan of a large sum of money at a rate of interest significantly lower than the going commercial rate effected a delivery to Beck of the difference between the interest payable at a commercial rate and the interest agreed on; (4) that irrespective of the interest rate the transaction—by which Fruehauf and Seymour made available a large, unsecured loan which Beck could not have gotten through normal financing channels—resulted in the delivery to Beck of a "thing of value," namely, the benefit of having the money in hand; (5) that irrespective of the particular incidents of this transaction, all loans, as such, violate the statute, either because the use of money is itself a "thing of value" which may not in any case be delivered by an employer to his employees' representative, even in consideration of the payment of interest, under the statute, or because every loan, *qua* loan, comports the "delivery" of the thing loaned, which delivery (regardless of repayment) violates § 302.[6] However, the District Court's ruling that, by admission of the Government, the transaction was a "loan," appears to mean that, in light of its trial memorandum, the Government is foreclosed from pursuing some, probably most, of these theories. Which among them the court thus viewed as closed remains uncertain. On the other hand, in a representation to this Court, the Solicitor General does not leave it unequivocally clear, so

[6] Subsection (c) of § 302 excepts five enumerated situations from the section's broad ban on delivery or receipt of any thing of value. *E. g.*, § 302 (c)(3) provides that the section shall not be applicable "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business."

as to preclude controversy in the lower court were the case to be allowed to go to trial, which (if not all) of the theories he would regard as still open. The only issue which we can be sure that the District Court decided as a matter of construction of the statute (as distinguished from those issues which the District Court held could not be proved under the indictment consistently with the Government's "judicial admission") is the issue posed by the fifth theory above—the issue posed, in its most evidently abstract form, by the question presented here in the Government's Jurisdictional Statement—"whether a loan of money," every loan of money, as such, "comes within the [statute's] . . . prohibitions."

We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the immediate considerations which should determine the disposition of appellees' motions to dismiss an indictment incontestably valid on its face—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give. See *Parker* v. *Los Angeles County*, 338 U. S. 327; *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *Arizona* v. *California*, 283 U. S. 423.

Nor does the record raise questions concerning the sufficiency of the indictment which would require, in an appropriate case, that the case be sent to the Court of Appeals, pursuant to 18 U. S. C. § 3731. For this is not

a case in which the District Court has construed the allegations of an indictment, or limited the scope of the Government's presentation by construction of a bill of particulars or the prosecutor's opening statement. In the present case we cannot know with reference to what supposed factual circumstances the District Court attributed to the Government the admission that the Beck-Fruehauf-Seymour transaction constituted a "loan." Without spelling out in detail the diverse argumentative possibilities that underlie the judge's attribution of a "loan" as an unequivocally defined concept to the Government, it suffices to say that experience in instances of similar unclarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court. Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, with *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85.

The core of the difficulty in the present case is that the record does not preclude the Government from attempting to prove that the transaction in question came within the statutory ban by reason of any or all possible theories. Of course, an undertaking by counsel here, however honorable its impulse, cannot bind the Government in the future. And the District Court's ruling, insofar as it purports to close any avenues open to the Government under the indictment—not in view of specifications made in a bill of particulars or an opening statement, but on the basis of a "judicial admission" culled from a pretrial memorandum—was impermissible and constitutes an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal.

We do not think, however, that the purpose of Rule 15 of this Court, under which the Government filed the Jurisdictional Statement which brought the case here, requires us to penalize the Government by dismissing this

appeal, *simpliciter*. This Court has the power, expressly provided in 28 U. S. C. § 2106, to "vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and . . . remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." The exercise of that authority is appropriate here. The ruling dismissing the indictment is set aside and the case is remanded for trial upon this valid indictment.

*So ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 91.—October Term, 1960.

United States, Appellant, v. Roy Fruehauf, et al. | On Appeal From the United States District Court for the Southern District of New York.

[February 20, 1961.]

Mr. Justice Stewart, dissenting.

The dismissal of the indictment in this case was placed squarely upon the district court's construction of a criminal statute. Specifically, the court ruled that a loan of money did not fall within the prohibition of § 302 of the Labor Management Relations Act of 1947 (before its amendment in 1959). In bringing the appeal directly here, the Government eliminated from the case any possible questions other than the correctness of the district court's construction of the underlying statute—to which this Court's jurisdiction is limited under the Criminal Appeals Act. 18 U. S. C. § 3731. *United States* v. *Keitel*, 211 U. S. 370, 397–398; *United States* v. *Patten*, 226 U. S. 525, 535, 540; *United States* v. *Colgate & Co.*, 250 U. S. 300, 301, 306; *United States* v. *Borden Co.*, 308 U. S. 188, 192–194. "[I]n reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For 'The Government's appeal does not open the whole case.'" *United States* v. *Petrillo*, 332 U. S. 1, 5.

I think the issue whether a loan of money came within the proscriptions of the statute is before us now and should be decided. I further think this is the only issue properly before us. However, since the Court thinks otherwise, I am persuaded that an expression of my views on the subject would not be appropriate.